STATE OF MICHIGAN

COURT OF APPEALS

LOUISE HERMAN-MUHAMMAD, Personal Representative of the Estate of CLARENCE R. WALKER, III, Deceased,

Plaintiff-Appellant,

v

WHITE & WHITE PHARMACY, INC., JANICE M. CUNNINGHAM, DEVERE R. CUNNINGHAM, JR., VERN LANINGA, BARBARA KLINGENMAIER, ROSEANNE DOWLING, THOMAS J. CAGNEY, and WENDY LAFRAY,

Defendants

and

LUTHERAN SOCIAL SERVICES OF MICHIGAN, LAURA MITCHELL, ANGELA JOHNSON, KIM DITTO, and SUSAN K. PALS,

Defendants-Appellees.

UNPUBLISHED
March 6, 2007

No. 270987
Kalamazoo Circuit Court
LC No. 03-000077-NO

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

In this tort action, plaintiff's decedent[1] suffered from severe physical and mental disabilities. Before Robbie's first birthday, the Muskegon Probate Court assumed jurisdiction over him, appointing a guardian because his parents were unable to care for him. By the end of

[1] The parties refer to the decedent as "Robbie," so we do also. Robbie was born August 17, 1987, and died at age 11 on September 13, 1998.

1997 the guardian also could no longer care for Robbie so the Muskegon Family Court placed him with the Family Independence Agency (FIA), now the Department of Human Services. The FIA contracted with defendant Lutheran Social Services of Michigan (LSSM) to find and supervise a suitable foster home placement for Robbie. LSSM placed Robbie in the home of Devere and Janice Cunningham, state licensed foster parents under LSSM's auspices. Robbie died in the Cunningham's home from positional asphyxiation after he became wedged between the mattress and side rail of his prescribed hospital bed. Plaintiff appeals by right the trial court's granting summary disposition to defendants, LSSM and its employees. We affirm.

In her third amended complaint, plaintiff claimed defendants were liable because (1) defendant LSSM breached its contract with the FIA, (2) defendants breached statutory obligations under the Child Protection Law, MCL 722.621 *et seq*., and the Mental Health Code, MCL 330.1722, (statutory abuse or neglect), (3) defendants violated Robbie's substantive due process rights (42 USC 1983 liability), and (4) defendants breached reporting obligations under MCL 722.623 and MCL 722.633. After discovery, defendants moved for summary disposition under MCR 2.116(C)(7), (8) and (10). The parties briefed and argued the motion. In rulings from the bench on January 5 and 18, 2006, the trial court granted defendants' motion.

On January 5, 2006, the trial court first ruled on a similar motion by FIA employees regarding plaintiff's last remaining claim against them under 42 USC 1983.[2] The trial court ruled that plaintiff had produced no evidence of deliberate indifference, the necessary level of culpability to prove a violation of substantive due process as a constitutional tort.[3] The court found no evidence that the FIA employees' actions or inactions were deliberately indifferent to any known or obvious risk of harm to Robbie, nor did their conduct cause any injury to Robbie. Specifically, the trial court found no evidence that the FIA employees had advance notice, or reason to know or suspect, that Robbie was being abused or neglected, or that he was in any immediate risk of harm. Thus, the court concluded there was no evidence that that the FIA employees disregarded a know or obvious risk of harm so as to establish they were deliberately indifferent to Robbie's substantive due process right to be free from the infliction of unnecessary harm in state-regulated foster home. The court also ruled that an intervening action caused Robbie's death, not the FIA employees' conduct.

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[2] The state employees included defendants Wendy Lafray, now Campeau, Roseanne Dowling, now Andrews, Vern Laninga, Barbara Klingenmaier, and Thomas Cagney. The trial court had earlier granted on the basis of governmental immunity, MCL 691.1407, the state employees' motion for summary disposition as to plaintiff's claims of negligence and gross negligence, but the court determined that it was premature to rule on plaintiff's federal claim. Plaintiff thereafter voluntarily dismissed her complaint as to defendants Klingenmaier, Laninga, and Cagney.

[3] The Due Process Clause of the Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." The Sixth Circuit Court of Appeals held in *Meador v Cabinet for Human Resources*, 902 F2d 474, 476 (CA 6, 1990), that because a state has a special relationship to children in foster care, the Due Process Clause extends the "right to be free from the infliction of unnecessary harm to children in state-regulated foster homes."

The LSSM defendants, in addition to the reasons advanced and accepted by the trial court with respect to the FIA employees, argued they were entitled to absolute immunity because of their close working relationship with the Muskegon Family Court, including reporting to and being supervised by the court. The trial court ruled that plaintiff's 42 USC 1983 claim against LSSM and its employees failed for the identical reasons that the court had granted summary disposition to the FIA employees. But the trial court postponed ruling on plaintiff's state law claims against defendants. Rather, the trial court afforded plaintiff the opportunity to file a supplemental brief regarding defendants' claim of absolute immunity, and to further develop her statutory abuse and neglect claim under MCL 330.1722 and MCL 722.622(f). The court specifically requested plaintiff's position regarding what she asserted defendants did or did not do that formed the basis of her state law claims.

On January 18, 2006, the parties appeared before the trial court for the purpose of starting trial and for the court to rule on the remaining issues regarding defendants' motion for summary disposition. The court first observed that plaintiff had not presented any evidence after three years of discovery that could establish a causal link between defendants' conduct and Robbie's death. And because plaintiff's claims against LSSM were derivative of its claims against the individual defendants, LSSM and its employees were entitled to summary disposition on all of plaintiff's state law claims. The trial court also ruled that defendants were entitled to absolute immunity as to plaintiff's state law theories of liability. Further, with respect to plaintiff's third-party beneficiary contract claim, the trial court ruled that the contract between FIA and LSSM was no more than a pledge to comply with preexisting statutory duties and was unsupported by adequate consideration. Moreover, the court ruled that plaintiff could not avoid the application of immunity by artful pleading of her state law claims. The trial court's order granting summary disposition to LSSM and its employees was entered on January 30, 2006.

Rather than go to trial, plaintiff and the last remaining defendant, White and White Pharmacy, Inc., reached a confidential settlement, which was placed on the record January 18, 2006. Further proceedings, including appointment of a guardian ad litem to review the settlement, delayed entry of final orders in the trial court. An order confirming the settlement was entered May 22, 2006, and an amended order disposing of all remaining claims was entered on June 16, 2006. Thereafter, plaintiff perfected this appeal of the January 30, 2006 order.

This Court reviews de novo a trial court's determination to grant or deny summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law while summary disposition under (C)(10) is proper when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25; 703 NW2d 822 (2005).

A motion under MCR 2.116(C)(7) may but need not be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Maiden*, *supra* at 119. The allegations of the complaint are accepted as true unless contradicted by documentary submissions. *Id*. "A trial court properly grants a motion for summary disposition under MCR 2.116(C)(7) when the undisputed facts establish the moving party is entitled to immunity granted by law." *By Lo Oil Co*, *supra* at 26.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120. The trial court is required to consider the submitted documentary evidence in the light most favorable to the nonmoving party. *Id*. The trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

We review constitutional questions de novo. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 541; 688 NW2d 550 (2004). We also note that plaintiff's federal constitutional right to due process and her tort claim under 42 USC 1983 are governed by federal law. *Markis v City of Grosse Point Park*, 180 Mich App 545, 553; 448 NW2d 352 (1988). Although this Court is "bound by the decisions of the United States Supreme Court construing federal law, . . . there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). We will follow lower federal court decisions, however, when we find their analyses and conclusions are persuasive. *Id*. at 607.

Plaintiff first argues that the trial court erred by concluding she had not produced evidence to create a material question of fact whether defendants were deliberately indifferent to Robbie's substantive due process rights under the Fourteenth Amendment Due Process Clause so as to support a tort claim under 42 USC 1983. We disagree.

42 USC 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The statute "itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). For plaintiff to prove her claim under § 1983, she must establish that: (1) defendants acted under color of state law; (2) defendants' conduct deprived plaintiff of a constitutional right; and (3) the deprivation of the constitutional right occurred without due process of law. *Markis, supra* at 553.

Although defendants argued below that they were not state actors, they have abandoned that position on appeal. Accordingly, we assume that LSSM and its employees were acting under color of state law by placing and supervising foster care for Robbie because of their relationship with the FIA, their role in implementing the family court's orders under the Juvenile Code, and their role in licensing the Cunningham's as foster parents. See *Rathbun v Starr Commonwealth for Boys*, 145 Mich App 303, 312; 377 NW2d 871 (1985) ("A private entity will be considered to have acted under color of state law for the purposes of 42 USC 1983 if it is performing a function which is essentially and traditionally public.").

Similarly, the parties cite no Michigan authority but agree that the federal courts recognize children in foster care have a substantive due process right to be protected from mistreatment at the hands of their foster parents. See *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 201 n 9; 109 S Ct 998; 103 L Ed 2d 249 (1989). The *DeShaney* Court held "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id*. at 196. But, "such a duty may arise out of certain 'special relationships' created or assumed by the State with respect to particular individuals." *Id*. at 197. The Court noted that in *Estelle v Gamble*, 429 US 97; 97 S Ct 285; 50 L Ed 2d 251 (1976), it had recognized such a duty by holding that "the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, . . . requires the State to provide adequate medical care to incarcerated prisoners." *DeShaney, supra* at 198 (citation omitted). The Court reasoned that because the state deprives prisoners of their liberty to provide for their own care, it is only "just" that the state be required to care for them. *Id*. at 199 (citations omitted). The Court noted it had also applied the same reasoning in holding substantive due process required states to provide "involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others." *Id*., citing *Youngberg v Romeo*, 457 US 307; 314-325; 102 S Ct 2452; 73 L Ed 2d 28 (1982). While expressing no view on the validity of the analogy, the Court in a footnote observed, "several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents." *DeShaney, supra* at 201 n 9.

The Sixth Circuit Court of Appeals in *Meador v Cabinet for Human Resources*, 902 F2d 474 (CA 6, 1990), followed the lead of other federal circuit courts of appeals that had applied the *Estelle* and *Youngberg* analogy in the context children in foster care.[4] The court in *Meador* held "that due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." *Meador, supra* at 476. Further, the court held that the plaintiff's complaint under § 1983 had sufficiently alleged that the defendants "were 'deliberately indifferent' to the reports of abuse" in the particular foster home at issue. *Id*. But the court did not address the level of proof necessary to establish "deliberate indifference." See *Lintz v Skipski*, 25 F3d 304, 305 (CA 6, 1994). Here, although the parties agree that the substantive due process right exists and that the standard of culpability is "deliberate indifference," they disagree on the necessary level of proof to establish culpability.

Defendants assert the standard is a subjective one, requiring plaintiff to show that defendants "actually knew of and disregarded an excessive risk to the ward's health or safety." Defendants rely primarily on *Farmer v Brennan*, 511 US 825; 128 L Ed 2d 811; 114 S Ct 1970 (1994), a case in which a prisoner alleged prison officials had been deliberately indifferent to the Eighth Amendment right precluding "cruel and unusual punishments." The Court rejected an objective test for "deliberate indifference" stated in *City of Canton v Harris*, 489 US 378; 109 S

[4] See *Taylor v Ledbetter*, 818 F2d 791 (CA 11, 1987) (en banc), and *Doe v NY City Dep't of Social Services*, 649 F2d 134 (CA 2, 1981).

Ct 1197; 103 L Ed 2d 412 (1989). In *Canton*, the Court addressed whether a municipality's alleged failure to adequately train its employees amounted to a "policy" or "custom" to establish § 1983 liability by being deliberately indifferent to constitutional rights. Justice White, writing for the majority, observed "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id*. at 390. Justice O'Conner, concurring in part and dissenting in part, opined that a municipality may be shown to be deliberately indifferent to constitutional rights when "a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens . . . ." *Canton, supra* at 396. The Court in *Farmer* distinguished the *Canton* objective test because it addressed the liability of a governmental entity, and "considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." *Farmer, supra* at 841. Instead, the Court held:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. [*Id*. at 837.]

On the other hand, plaintiff argues "deliberate indifference" is "the equivalent of recklessly disregarding a risk of harm." Plaintiff cites *Howard v Grinage*, 82 F3d 1343, 1352 (CA 6, 1996). But that case applied the *Canton* objective test to an alleged violation of procedural due process. *Howard, supra* at 1346-1350.

The difference between the two approaches is elusive. The Court in *Farmer* recognized that the subjective state of mind of an official might be proved by circumstantial evidence. *Farmer*, *supra* at 842. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id*. Even defendants recognize in their brief on appeal that "deliberate indifference" "means evidence showing an obvious indifference, not a 'collection of sloppy, or even reckless oversights.'" Brief at 12, citing *Doe v Claiborne Co, Tenn*, 103 F3d 495, 508 (CA 6, 1996). Like *Canton*, *Doe* involved a corporate entity, a school board. The Doe court noted that for § 1983 liability to attach, "[t]he evidence must show that the need to act is so obvious that the School Board's 'conscious' decision not to act can be said to amount to a 'policy' of deliberate indifference to Doe's constitutional rights." *Doe, supra* at 508.

Our Supreme Court has recognized that a party asserting a constitutional violation under § 1983 must meet different standards of proof depending on whether the claim is asserted against an individual or a corporate entity. See *Jackson v Detroit*, 449 Mich 420, 434; 537 NW2d 151 (1995). The *Jackson* Court applied the subjective standard adopted in *Farmer* to § 1983 claims against individuals. *Jackson, supra* at 430-432. Under the subjective test, neither mere negligence nor the failure to alleviate a significant risk that the defendants should have but did not perceive is insufficient to establish deliberate indifference. *Id*. at 430. Rather, the person

"must both be aware of facts from which the inference that a substantial risk of serious harm exists could be drawn, and he must also draw the inference." *Id*. at 431, citing *Farmer, supra* at 837.

Regarding a § 1983 claim against a municipal corporation, our Supreme Court has defined "deliberate indifference," consistent with *Canton,* as contemplating "knowledge, actual or constructive, and a conscious disregard of a known danger." *York, supra* at 757. Further, "[a] governmental entity cannot be found liable under § 1983 on a respondeat superior theory. Rather, such liability can be imposed only for injuries inflicted pursuant to a governmental 'policy or custom.'" *Jackson, supra* at 433, citing *Monell v New York City Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). The same constitutional analysis with respect to local units of government should apply to a private corporate entity such as LSSM subject to a § 1983 claim because it is acting under color of state law. This is because the Supreme Court in holding that municipalities came within the meaning of the word "person" as used in 42 USC 1983 reasoned that municipal corporations and private corporations were both considered legally the same as a natural person at the time the Civil Rights Act of 1871 was adopted. *Monell, supra* at 687-689. So, the constitutional analysis with respect to a private corporate entity subject to a § 1983 claim because it is acting under color of state law would be the same as that with respect to a local unit of government.

Moreover, the plain language of 42 USC 1983 - "subjects, or causes to be subjected . . . to the deprivation of any rights" - requires that a direct causal link be established between the deliberate indifferent conduct and the asserted constitutional deprivation. See *Canton, supra* at 387 (White, J.), 393 (O'Conner, J.) "There must be an affirmative link between the policy or custom and the particular constitutional violation alleged. The alleged policy or custom must be the 'moving force' of the constitutional violation in order to establish liability." *Jackson, supra* at 433, citing *Monell, supra* at 694. Thus, "for liability to attach . . . the identified deficiency . . . must be closely related to the ultimate injury," *Canton, supra* at 391 (White, J.), which "entails more than simply showing 'but for' causation." *Id*. at 393 (O'Conner, J.). When corporate liability is alleged, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee[s]." *Bd of Comm'rs of Bryan Co, Okla v Brown*, 520 US 397, 405; 117 S Ct 1382; 137 L Ed 2d 626 (1997).

Here, the only risk that actually caused any harm to Robbie was his hospital bed that had a gap between the mattress and side rail. Plaintiff points to no evidence from which it may be inferred that any of the individual LSSM defendants knew that Robbie faced a risk of harm from the hospital bed. Accordingly, plaintiff failed to produce evidence on which reasonable people could differ that would permit an inference that the LSSM employees were subjectively aware of and disregarded an excessive risk to Robbie's safety. Thus, the trial court correctly ruled that the individual LSSM defendants were entitled to judgment as a matter of law on plaintiff's § 1983 claim; there simply was no evidence that defendants were deliberately indifferent to an excessive risk to Robbie's safety. *Farmer, supra* at 837; *Meador, supra* at 476.

The trial court also correctly granted LSSM judgment as a matter of law on plaintiff's § 1983 claim. First, plaintiffs point to no policy or custom of LSSM that was the "moving force" of the constitutional violation alleged. *Jackson, supra* at 433. Second, on the facts and circumstances of this case, the risk of harm to Robbie posed by the hospital bed was not so obvious and so likely to result in a violation of Robbie's constitutional rights that LSSM can

reasonably be said to have been deliberately indifferent to Robbie's substantive due process right to the right to be free from the infliction of unnecessary harm. *Canton, supra* at 390; *Meador, supra* at 476. Accordingly, the trial court correctly ruled that LSSM was entitled to judgment as a matter of law on plaintiff's § 1983 claim.

Plaintiff's arguments to the contrary are unavailing. Plaintiff asserts that the LSSM social workers were aware the Cunninghams lacked experience and training in how to attend to a foster child who needed a hospital bed and also that LSSM failed to assess the safety and risk of using the hospital bed. Plaintiff relies on expert testimony to establish these claims. But none of plaintiff's expert could establish that the LSSM employees had actual knowledge of the risk the hospital bed with side rails posed to Robbie. Further, Dr. E. Dennis Lyne, Robbie's treating physician who "prescribed" the hospital bed for Robbie, testified that the side rails on the bed were irrelevant in light of Robbie's physical condition and because he was in a body cast. It was believed Robbie could not move about the bed or roll over on his own. Mrs. Cunningham also testified that Robbie had not previously been able to roll over on his own. One of plaintiff's experts, LaJuan Lucas, testified that the Cunninghams had to know Robbie was moving about his bed and that the Cunninghams were negligent in failing to constantly monitor him. Another of plaintiff's experts, Laura Conklin, testified that a hospital bed without side rails was appropriate because, with Robbie's physical ailments and his being in a body cast, he was able to turn from side to side.

This evidence does not support an inference that the LSSM employees were subjectively aware of the risk of harm to Robbie. Nor does it support an inference that the risk was "so obvious, and the inadequacy so likely to result in the violation of constitutional rights," *Canton, supra* at 390, so as to put LSSM "on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights." *Id*. at 396; see also *York, supra* at 757. At best, the evidence related to negligent conduct. Consequently, neither plaintiff's expert testimony nor the arguments she extrapolates from it establish that either LSSM or its employees were "deliberately indifferent." "Mere negligence does not amount to deliberate indifference." *Jackson, supra* at 430, citing *Estelle, supra* at 104.

Plaintiff also argues that the LSSM employees were aware that the Cunningham's teenage daughter had engaged in sexual activity with a 13-year-old foster child in their home yet did not remove Robbie from the home. This argument fails because it lacks any causal link to the harm that actually happened to Robbie. While it is true that LSSM could have removed Robbie from the Cunninghams' home, neither LSSM nor FIA believed Robbie was in any immediate risk of harm. Moreover, had Robbie been moved to another foster home, his hospital bed would also have been moved. The risk of harm would not have been alleviated.

Accordingly, we conclude that the trial court correctly ruled that LSSM and its employees were entitled to judgment as a matter of law on plaintiff's § 1983 claim.

Next, plaintiff argues that the trial court erred in ruling defendants were entitled to absolute immunity regarding all of plaintiff's state law theories of liability. We disagree.

In *Martin v Children's Aid Society*, 215 Mich App 88, 95-97; 544 NW2d 651 (1996), this Court found persuasive and followed federal case law that had extended absolute immunity to social workers with regard to the initiation and monitoring of court-supervised child placements.

In *Martin*, like the present case, the Department of Social Services (DSS) had contracted with the Children's Aid Society (CAS), a private organization, to provide services for neglected and abused children. *Id*. at 91. Also, like the present case, the DSS transferred the minor at issue to the CAS for foster home placement. After a jury determined the minor had been abused, the probate court made the minor a temporary ward of the court and continued the child in foster care. *Id*. at 91-92. On appeal, this court affirmed the jurisdiction of the probate court but reversed as to the dispositional order continuing the minor's foster placement. *Id*. at 93. On remand, the minor was returned to her parents who sued the DSS and the CAS under a number of theories "including negligence, breach of statutory and contractual duties, bad faith, and violation of their constitutional rights. *Id*. at 94.

The *Martin* Court observed that federal precedents "recognize the important role that social workers play in court proceedings to determine when to remove a child from the home and how long to maintain the child in foster care. They also recognize that, to do that difficult job effectively, social workers must be allowed to act without fear of intimidating or harassing lawsuits by dissatisfied or angry parents." *Id* at 94. The Court extended absolute immunity to the nongovernmental CAS social workers, finding it "necessary to assure that our important child protection system can continue to function effectively." *Id* at 97. The Court noted it was not extending "blanket absolute immunity," and that its decision was "limited to the facts of this case, in which the close oversight of the social worker's placement recommendations by the probate court is especially noteworthy." *Id*. at 95-96 n 5. The Court further observed that regular court hearings regarding a child's placement would provide judicial oversight sufficient to protect against wrongful conduct by the CAS defendants. *Id*. 98.

This Court has continued to follow *Martin* in its extension of absolute immunity to social workers in claims arising out of court-supervised child placements. In *Spikes v Banks*, 231 Mich App 341; 586 NW2d 106 (1998), a fifteen-year-old temporary ward of the court was placed the foster home of Annie Banks by Teen Range, Inc., a child care organization. While in the Banks' foster home, the ward became pregnant by Banks' 23-year-old nephew who either lived in the home without the knowledge or permission of Teen Ranch or frequently visited. *Id* at 343-344, n 2. The plaintiff alleged both Teen Ranch and Banks were negligent in providing for her care. This Court affirmed the trial court's grant of summary disposition to Teen Ranch finding that *Martin* "controlled the outcome of Teen Ranch's motion for summary disposition." *Banks*, *supra* at 347. The Court agreed with the circuit court that Teen Ranch was absolutely immune from tort liability arising from its placement and supervision of the plaintiff. *Id*.

This Court also followed *Martin* in *Diehl v Danuloff*, 242 Mich App 120; 618 NW2d 83 (2000), extending absolute immunity to a licensed psychologist who performed psychological evaluations and made recommendations to the circuit court in connection with a custody petition. The plaintiff filed the suit alleging professional negligence in the manner in which the defendant performed the custody evaluation. *Id*. at 122. This Court observed that "courts in other jurisdictions have [virtually uniformly] granted quasi-judicial immunity to individuals who perform functions analogous to those performed by [the] defendant . . . ." *Id*. at 129. Quoting *Duff v Lewis*, 114 Nev 564, 570-571; 958 P2d 82 (1998), this Court opined,

> "The common law doctrine of absolute immunity extends to all persons who are an integral part of the judicial process. The purpose behind a grant of absolute immunity is to preserve the independent decision-making and truthfulness of

> critical judicial participants without subjecting them to the fear and apprehension that may result from a threat of personal liability." [*Danuloff, supra* at 131.]

The Court found that the "defendant served as 'an arm of the court' and 'performed a function integral to the judicial process' and, therefore, held that the court-appointed psychologist was entitled to absolute quasi-judicial immunity. *Danuloff, supra* at 133 (citations omitted).

Most recently, this Court applied the *Martin* rule of absolute social worker immunity in *Beauford v Lewis*, 269 Mich App 295; 711 NW2d 783 (2005). The plaintiff in *Beauford* retained custody of her daughter following proceedings to terminate her parental rights. The plaintiff brought a tort action against, among others, the primary Child Protective Services (CPS) investigator with respect to the abuse and neglect allegations. *Id*. at 297. The trial court granted of summary disposition to the CPS worker on the basis of absolute immunity, and the plaintiff appealed contending that *Martin* had not extended "blanket absolute immunity" to social workers. *Beauford, supra* at 298. The plaintiff argued that "close oversight" as discussed in *Martin, supra* at 95-96 n 5, had not occurred because the family court had not closely monitored the CPS worker's investigation. *Beauford, supra* at 298-299. This Court disagreed, explaining again the rationale for absolute immunity:

> Social workers are granted absolute immunity from civil litigation arising out of their work as "advisors and agents" of the probate court (now to the family division of circuit court) because that court provides parents and other interested parties with a sufficient remedy for any wrongful action by a social worker. This Court stated, as a policy behind this rule, that without the threat of civil litigation, social workers have more freedom to honestly assess a particular situation, while the court still provides parents with a forum in which to contest these assessments and recommendations. [*Id*. at 300 (citations omitted).]

Regarding the plaintiff's argument that "close oversight" was lacking, the *Beauford* Court explained that "close oversight" did not require the family court to oversee every discrete act of the social worker, or require active, close monitoring. *Beauford, supra* at 301. Rather, the *Martin* Court's reference to "close oversight" referred to "a situation in which the probate court had reviewed the defendant social workers' findings and recommendations, and took action as a result, at proceedings in which the [minor's] parents were able to contest the recommendations." *Id*., citing *Martin, supra* at 91-93, 98.

In this case, plaintiff argues that LSSM and its employees could enjoy quasi-judicial immunity only if they were performing a ministerial function at the specific direction of the family court. As authority for this proposition, plaintiff cites several federal cases[5] and *Diehl, supra* at 129 n 2. But the cited federal cases all address the availability of immunity from claims brought alleging violations of the federal Civil Rights Act, in particular, 42 USC 1983. This

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[5] Plaintiff cites *Waits v McGowan*, 516 F2d 203, 206-207 (CA 3, 1975), *Kermit Const Corp v Banco Credito Y Ahorro Ponceno*, 547 F2d 1 (CA 1, 1976), *Hodorowski v Ray*, 844 F2d 1210, 1214 (CA 5, 1988), and *Gardner v Parson*, 874 F2d 131, 146 (CA 3, 1989).

Court in *Martin* and the cases that have followed *Martin* only establish absolute immunity for social workers with respect to state law causes of action arising out of court-supervised child placements. The *Martin* Court specifically noted that the absolute immunity it adopted for social workers may not be available for federal claims brought under 42 USC 1983. *Martin*, *supr*a at 94 n 1, 95 n 4.

The *Diehl* footnote merely lists a number of cases from other jurisdictions that extend absolute immunity to professionals performing court-ordered functions to assist the court in making custody decisions. These fact specific cases from other jurisdictions are of little help in establishing the extent of this State's social worker immunity. Rather, there is nothing in *Martin* or its progeny that supports the limitation plaintiff suggests.

Plaintiff also argues that the absolute immunity adopted by *Martin* would only apply to tort liability, not civil liability in general. Plaintiff's argument is based on limitations applicable to sovereign immunity or statutory governmental immunity. See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984); MCL 691.1401 *et seq.* Plaintiff's argument fails because the absolute immunity adopted in *Martin* is not governmental immunity. See *Martin, supra* at 95-96 n 5 ("the immunity we afford to the CAS defendants does not arise from" a governmental immunity statute). Furthermore, the *Martin* Court extended absolute immunity to the CAS defendants as to all of the plaintiffs' claims, which included "negligence, breach of statutory and contractual duties, bad faith, and violation of their constitutional rights." *Id*. at 93. Thus, the absolute immunity adopted in *Martin* extends beyond tort liability to claims like in this case of alleged breach of contractual or statutory duties.[6]

Last, plaintiff argues that family court did not engage in close oversight of the LSSM defendants because it was statutorily precluded. Plaintiff cites in support of this argument *Wayne Co v State of Michigan*, 202 Mich App 530, 535; 509 NW2d 853 (1993), and MCL 712A.18(1)(c) ("If a juvenile is within the court's jurisdiction under section 2(b) of this chapter, the court shall not place a juvenile in a foster care home subject to the court's supervision."). This argument fails for the reasons discussed by this Court in *Beauford, supra*. Whatever the import of § 18(1)(c), the record here clearly establishes that the Muskegon Family Court engaged in regular, periodic, mandated review of Robbie's placement. See MCL 712A.19; MCR 3.975(C). For these review hearings, the family court received status reports and updated services plans authored by the LSSM social workers and co-signed by supervising FIA social workers. Accordingly, the family court engaged in "close oversight" of the LSSM social workers so that they were protected by absolute immunity from plaintiff's state law liability claims. *Beauford, supra* at 299-301; *Martin, supra* at 95-98.

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[6] For the same reasons, this Court rejected similar arguments in *Richmond v Catholic Social Services*, unpublished opinion of the Court of Appeals, decided June 24, 2004 (Docket No. 246833), slip op 2-3.

Because we conclude for the reasons discussed above that the trial court properly granted defendants summary disposition, we need not address the remaining arguments of the parties.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E.Markey
/s/ Kurtis T. Wilder